

MAR 13 2006

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

In re:

ARTHUR WEITZMAN,

Debtor.

AMERICAN EXPRESS BANK, FSB,

Appellant,

v.

ARTHUR WEITZMAN,

Appellee.

) BAP No. CC-05-1155-BKJ

) Bk. No. LA-03-42260-VZ

M E M O R A N D U M¹

Argued and Submitted on January 18, 2006 at
Pasadena, California

Filed - March 13, 2006

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Vincent Zurzolo, Bankruptcy Judge, Presiding

Before: BRANDT, KLEIN and JAROSLOVSKY,² Bankruptcy Judges.

¹ This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

² Hon. Alan Jaroslovsky, United States Bankruptcy Judge for the Northern District of California, sitting by designation.

1 Debtor/appellee filed a chapter 7³ petition, scheduling the
2 undisputed debt of American Express Bank, FSB ("AmEx") noting that
3 charges were incurred in connection with a related, bankrupt
4 corporation. AmEx filed a proof of claim for unpaid charges, and Debtor
5 objected, arguing AmEx's documentation was inadequate to establish his
6 individual liability.

7 After a contested claims hearing, the bankruptcy court sustained
8 Debtor's objection and denied the claim. AmEx timely appealed. We
9 REVERSE.

11 I. FACTS

12 Arthur Weitzman filed a chapter 7 petition on 24 December 2003 and
13 listed a \$19,837 debt to AmEx for "credit card purchases used primarily
14 in connection with bankrupt business." He left blank the corresponding
15 columns which would identify the debt as "contingent, unliquidated, or
16 disputed."

17 AmEx timely filed a proof of claim for an unpaid balance of
18 \$20,310.48, and attached a one-page summary statement, "prepared for
19 Arthur Weitzman, JAA Employment."

20 Weitzman objected to AmEx's claim, and moved for a determination.
21 He denied any individual liability to AmEx because the account was the
22 "business management account" of J.A.A. Employment Agency, Inc. ("JAA").

24 ³ Absent contrary indication, all "Code," chapter and section
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 prior to
26 its amendment by the Bankruptcy Abuse Prevention and Consumer
27 Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23, as the case from
which the adversary proceeding and these appeals arise was filed
before its effective date (generally 17 October 2005).

28 All "Rule" references are to the Federal Rules of Bankruptcy
Procedure, and all "FRCP" references are to the Federal Rules of Civil
Procedure.

1 JAA had previously filed its own chapter 7 petition on 9 July 2002,
2 which Weitzman signed in his capacity as president.

3 One paragraph in Weitzman's declaration specifically addressed the
4 basis for his objection:

5 [T]his claim should be denied because I do not owe the debt;
6 the debt was owed by my former business [JAA]. . . . [American
7 Express] . . . claims that I owe the debt but their claim has
8 failed to provide any evidence that the debt is owed by me.
9 The only supporting documentation provided is a Business
10 Management Account Statement indicating an amount owed with my
11 name and JAA . . . listed. They have failed to present any
contracts, loan applications, personal guarantees, or other
evidence to support the claim that the debt is owed by me.
Indeed, the debt is not owed by me. I did not personally
borrow the funds; the funds were borrowed by my former
company. Nor did I personally guarantee the amount claimed
due and owing.

12 Nowhere did he explain Schedule F, or why he did not schedule the debt
13 as "disputed."

14 AmEx filed a response and the declaration of its account manager,
15 Roy Daigle, attaching monthly account statements generated over more
16 than 18 months, from June 2002 to December 2003, which showed a balance
17 of \$20,310.48 (as of 24 December 2003) for purchases. Daigle stated
18 that JAA opened the account on 14 November 1996, and in support,
19 attached an unsigned, standard form agreement, entitled "Agreement Among
20 Business Credit Cardmember, Company and American Express Centurion Bank"
21 (the "Agreement"). AmEx did not attach JAA's application for credit
22 because, according to Daigle, it had been purged due to the age of the
23 account. It did assert that, under the Agreement, Weitzman was jointly
24 and individually liable as the "authorizing officer" for JAA, and that
25 his use of the card as a "cardmember" was a separate basis for
26 liability.

27 The Agreement's second paragraph provides in part:

28 You have received this card at the request of the Company
for use in connection with the Card Account. You will be

1 called a Cardmember. . . . If you are the officer who
2 authorized us to issue one or more Cards by signing and/or
3 otherwise completing the Company's application for the Card
4 Account (the "Authorizing Officer"), you agree to be bound by
5 the terms of this Agreement as they apply to the Company
[defined as the corporation in whose name the account is
6 established]. . . . The Company and any Cardmembers using the
7 Card Account agree both jointly and individually to be bound
8 by the terms of this Agreement.

9 Weitzman never disputed that he was the authorizing officer on the
10 Agreement, nor refuted Daigle's declaration that he had personally used
11 the card, nor that he had received copies of the Agreement with the card
12 initially issued him and his 2002 replacement card.

13 AmEx also argued that debtor's and JAA's schedules were a "judicial
14 admission of liability," and, absent exceptional circumstances, the
15 claim should not be reconsidered.

16 After a brief contested hearing on the written submissions (no one
17 requested an evidentiary hearing or objected to the court's ruling on
18 the papers), the bankruptcy court sustained debtor's objection to claim:

19 The gravamen of the objection is . . . that the claimant has
20 failed to submit writings in support of the proof of claim
21 which would establish that this individual Chapter 7 debtor
22 undertook personal liability for a credit card issued to a
corporation [with] which the debtor was associated.

23 That is true, the documents submitted with the proof of
24 claim . . . were not signed, did not show that the liability
25 was imposed by way of a contract upon the individual debtor.
26 [At] that point the burden shifts to the Claimant American
Express to provide documents or other evidence that would
27 establish liability of Arthur Weitzman for the obligation on
28 this credit account.

American Express failed to provide that evidence. If
American Express would be able to establish that Mr. Weitzman
was indeed the authorizing officer then he would [have] had
personal liability for this obligation. American Express has
failed to provide evidence establishing that. As a result the
objection to claim is granted.

Transcript, 5 April 2005 at 6-7.

1 **V. DISCUSSION**

2 A. Standing

3 Although AmEx has not questioned Weitzman's standing, we have an
4 independent obligation to consider it. In re Lucas Dallas, Inc., 185
5 B.R. 801, 804 (9th Cir. BAP 1995). A party must be "directly and
6 adversely affected pecuniarily by" the order in question to have
7 standing. Matter of Fondiller, 707 F.2d 441, 442-43 (9th Cir. 1983);
8 In re Cheng, 308 B.R. 448, 454-55 (9th Cir. BAP 2004), aff'd, 2005 WL
9 3525643 (9th Cir. 2005). Ordinarily a surplus estate is required for
10 debtor to have standing in a claim objection. In re P.R.T.C. Inc., 177
11 F.3d 774, 778 (9th Cir. 1999).

12 The Trustee's 30 June 2005 final report in the bankruptcy court's
13 docket, of which we may take judicial notice,⁴ reflects that this is an
14 asset case. The parties indicated at argument that it may be a surplus
15 case; Debtor thus has standing.

16
17 B. Objections to Claims

18 The claimant establishes a prima facie case against the debtor by
19 filing the proof of claim which complies with the requirements of the
20 Rules. Under the Code,

21 [a] claim or interest, proof of which is filed under section
22 501 of this title, is deemed allowed, unless a party in
23 interest, including a creditor of a general partner in a
partnership that is a debtor in a case under chapter 7 of this
title, objects.

24 § 502(a). The evidentiary presumption in Rule 3001(f) provides that
25 "[a] proof of claim executed and filed in accordance with these rules
26 shall constitute prima facie evidence of the validity and amount of the

27
28 ⁴ We may take judicial notice of the bankruptcy court's records. In re E.R. Fegert, Inc., 887 F.2d 955, 957-58 (9th Cir. 1989).

1 claim." See also In re Networks Electronic Corp., 195 B.R. 92, 96 (9th
2 Cir. BAP 1996); In re Pugh, 157 B.R. 898, 901 (9th Cir. BAP 1993); and
3 4 Keith M. Lundin, Chapter 13 Bankruptcy, 3d § 287.1 (2000 and Supp.
4 2004).

5 An objecting party must produce evidence to rebut the claim. An
6 objection not supported by evidence might not overcome the presumption
7 of validity:

8 The mechanics of what it takes to rebut the presumption
9 are driven by the nature of the presumption as "prima facie"
10 evidence of the claim's validity and amount. The proof of
11 claim is more than "some" evidence; it is, unless rebutted,
12 "prima facie" evidence. One rebuts evidence with counter-
13 evidence.

14 In re Garner, 246 B.R. 617, 622-23 (9th Cir. BAP 2000). "In practice,
15 the objector must produce evidence which, if believed, would refute at
16 least one of the allegations that are essential to the claim's legal
17 sufficiency." Lundell v. Anchor Constr. Specialists, Inc., 223 F.3d
18 1035, 1040 (9th Cir. 2000) (citation omitted, emphasis in original).

19 Once rebuttal evidence is produced, the burden of production shifts
20 back to the claimant. The ultimate substantive burden, however, is on
21 the claimant to prove the validity of the claim by a preponderance of
22 the evidence. Sierra Steel, 96 B.R. at 277; Garner, 246 B.R. at
23 623-24.

24 C. Evidentiary Hearing Necessary?

25 An objection to claim is a contested matter governed by Rule 9014,
26 making Rule 7052 applicable. Rule 9014(d) provides:

27 (d) Testimony of witnesses with respect to disputed material
28 factual issues shall be taken in the same manner as testimony
in an adversary proceeding.

(emphasis added).

1 AmEx did not argue that debtor's denial of his individual liability
2 created a disputed material factual issue requiring an evidentiary
3 hearing, nor so argued in its briefs to us. AmEx has waived this issue,
4 In re Vigil Bros. Constr., Inc., 193 B.R. 513, 520 (9th Cir. BAP 1996);
5 U.S. v. Carlson, 900 F.2d 1346, 1349 (9th Cir. 1990) (issues not raised
6 at the trial court will not be considered for the first time on appeal);
7 and Laboa v. Calderon, 224 F.3d 972, 985 (9th Cir. 2000) (issues not
8 specifically and distinctly argued in the opening brief are deemed
9 waived); (In re Sedona Institute, 220 B.R. 74, 76 (9th Cir. BAP 1998),
10 aff'd, 21 Fed. Appx. 723 (9th Cir. 2001) (issues not briefed are deemed
11 waived). Hence we need not consider whether an evidentiary hearing was
12 required under Rule 9014(d).

13
14 D. The Merits

15 1. Evidence on the Claim Objection

16 No testimony was taken, so the evidence was:

- 17 • AmEx's proof of claim, attaching one-page statement;
18 • Weitzman's objection and his 16 December 2004 declaration;
19 • AmEx's reply, attaching Daigle's declaration with copy of the pro
20 forma Agreement and prepetition monthly statements.

21 Weitzman never objected to the substance of the claim, only to
22 AmEx's proof, specifically that AmEx had not submitted sufficient
23 documentation to show his liability. The order sustaining the objection
24 was predicated on the legal conclusion that AmEx was required to produce
25 the actual, signed agreement for the claim to be allowed. Although
26 "[w]hen the debt is based on a writing, the documents must be filed with
27 the proof of claim[,]" Rule 3001(f), the required attachments vary,
28 depending on the applicable state law (here, Utah) and the nature of the

1 claim. Campbell, 330 B.R. at 435-36 (schedules may be construed as a
2 debtor's admission of liability, and applying and interpreting Heath,
3 331 B.R. 424) (claim objection that does not actually contest debtor's
4 liability or the amount of the debt is insufficient to disallow a proof
5 of claim, even if the claim lacks Rule 3001(c) required documentation).

6 Weitzman never objected to the admissibility of the Agreement or
7 the Daigle declaration. See Garner, 246 B.R. at 625 ("in bankruptcy
8 contested matters, affidavit testimony that is based on personal
9 knowledge of the witness is admissible hearsay on the authority of
10 Federal Rule of Evidence 802") (emphasis in original). He does not
11 dispute that the Agreement governs determination of the claim, and does
12 not deny entering into the Agreement on behalf of JAA.

13 Nor did Weitzman dispute his status as authorizing officer and
14 cardmember, and the evidence shows his use of the account after
15 corporate bankruptcy (which Weitzman questioned in his memorandum, but
16 without sworn contradiction). After JAA's petition, he made payments to
17 AmEx from his personal checking account, and continued to incur new
18 charges on the account, unrelated to the defunct corporate business.

19 Weitzman cited no authority for the proposition that AmEx needed to
20 produce a signed credit agreement in order to prove individual
21 liability. The parties have not cited any case law to show exactly what
22 type or level of documentary support is necessary to establish
23 individual liability for credit card debt. Neither the Code nor the
24 Rules nor the Federal Rules of Evidence so require.

25 While AmEx's proof of claim, lacking sufficient documentation in
26 the circumstances, did not merit the presumption of validity, the
27 declaration in support of its response to Weitzman's objection, neither
28

1 objected to nor contradicted, showed sufficient facts to establish his
2 liability as a cardmember and perhaps as authorizing officer.

3 Having applied the wrong legal standard, the bankruptcy court
4 erred in sustaining Debtor's objection.

5
6 **VI. CONCLUSION**

7 While its proof of claim was insufficient to warrant presumed
8 validity under the Rules, AmEx introduced evidence on rebuttal, the
9 preponderance of which established its claim. The bankruptcy court
10 erred in concluding that AmEx had not met its burden of proof. We

11 REVERSE.
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